

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD RAY SMITH,

Defendant-Appellant.

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UNPUBLISHED

March 14, 2006

No. 258568

Otsego Circuit Court

LC No. 03-002918-FC

Before: Smolenski, P.J., Whitbeck, C.J., and O’Connell, J.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree criminal sexual conduct (CSC II), MCL 750.520c, and felonious assault, MCL 750.82. He was sentenced to serve concurrent terms of 96 to 180 months’ imprisonment for the CSC II conviction and 24 to 48 months’ imprisonment for the felonious assault conviction. We affirm.

This case arose when defendant carved a swastika into his girlfriend’s right breast with a pocket knife, cut “f\*\*\* you” across the middle of her chest and onto her left breast, battered her body, bit her face, and bit her ears, leaving her earlobes black with bruising. Although defendant argued that the complainant girlfriend consented to this treatment as a symbol of her obsequious submission to him or for her own gratification, the complainant is a mature woman who showed the knife marks to a friend and reported the abuse to authorities when opportunities to tell her story safely and discreetly arose. She conspired with her friend to borrow the knife away from defendant, but he battered and bit her that night for not removing her clothes. When she accompanied defendant to the hospital (he had dropped his motorcycle on his foot), she told authorities about the abuse. Her friend then provided police with the knife.

Defendant first argues that the trial court violated his constitutional right to a fair trial in denying his request for a supplemental jury instruction. We disagree. The proposed instruction would have reiterated that defendant’s touching of the complainant’s breasts constituted sexual contact only if it was done for sexual gratification or revenge, to cause humiliation, or out of anger, but not if it was incidental to another act. We review de novo claims that the jury was improperly instructed, but defer to the trial court’s discretion when the decision to give an instruction involves the determination of its application to a case’s particular circumstances. *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005). “Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried

and sufficiently protected the defendant's rights." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Here, the court scrupulously specified the purposes for which the contact had to occur before it could constitute sexual contact, and the court carefully distinguished between sexual contact and incidental contact. When the jury raised questions regarding the sexual element, the trial court revisited the distinction between the different types of contact and carefully reiterated that mere contact with complainant's breast was insufficient. Therefore, the requested supplemental instruction was substantially covered in the charge given to the jury. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995). Moreover, the instructions that were given fairly presented the issues to be tried and sufficiently protected defendant's rights. *Aldrich, supra*. Therefore, the trial court did not err when it denied defendant's request for a supplemental jury instruction.

Defendant next argues that the trial court abused its discretion when it permitted a lay witness, complainant's friend, to testify regarding what defendant characterizes as battered-woman syndrome. We disagree. "A defendant will not be heard to introduce and use evidence to sustain his theory at trial and then argue on appeal that the evidence was prejudicial and denied him a fair trial." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Accordingly, where the challenged testimony is relevant to issues raised by the defendant himself, the trial court does not err in permitting that testimony. *Id.* at 377-378.

In this case, the prosecutor elicited testimony from complainant's friend that complainant was afraid of defendant. When the prosecutor asked the friend how she knew that complainant's facial expressions and actions reflected fear, the friend responded that "I've been there, I could tell." The prosecutor then clarified that the response "I've been there" meant that the friend had suffered domestic abuse herself. Defendant objected to the response, but the judge overruled the objection. The prosecutor did not further the line of questioning, except to ask, "And is that what you saw coming from [the complainant] . . . ?" The friend said yes, and the prosecutor dropped the issue. However, the friend also testified that complainant showed her the marks on her chest and expressly told her that she was afraid defendant would kill her if the friend did not get the knife away from him. The initial testimony regarding the witness' personal experience with abuse clarified the witness' statement "I've been there . . . ." The additional testimony was based on the witness' perception of the complainant and was "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 701. Therefore, the trial court did not abuse its discretion in allowing it.

On cross examination, defense counsel asked the complainant's friend why she thought the complainant stayed with defendant and did not run away when given the opportunity. Defense counsel also asked the friend if she suggested to complainant that there were "places to get help" for abuse or if the friend offered to take the complainant to the police. The witness responded that the complainant was afraid defendant would come after her and that it would be worse when he caught up with her. The prosecution's questions on redirect examination allowed the witness to develop her testimony and explain that her personal experience with abuse led her to believe that the police would not help and that running away was foolish. Because the challenged testimony was relevant to credibility issues raised by defendant, the trial court did not abuse its discretion by permitting it. Moreover, the complainant personally testified about her

paralyzing fear, so her friend's testimony about complainant's mental state was cumulative, and its admission did not affect the trial's outcome. MRE 103(a).

The crux of defendant's remaining argument is that his sentence was improperly determined under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has explicitly concluded that *Blakely* does not apply to Michigan's indeterminate statutory sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Affirmed.

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

/s/ Peter D. O'Connell